

 **New Jersey NAELA**
National Academy of Elder Law Attorneys
New Jersey Chapter

November 9, 2020

Greg Woods, Chief Innovation Officer
Division of Medical Assistance and Health Services
NJ Department of Human Services
PO Box 712
Trenton, NJ 08625
Via email greg.woods@dhs.state.nj.us

Re: NJ 1115 2020 Comprehensive Demonstration Renewal

Dear Mr. Woods:

Thank you for the opportunity to comment and offer suggestions on this very important subject. NJ NAELA would like to submit the following comments and suggestions specifically regarding the continued use of Qualified Income Trusts (QITs) in New Jersey's Medicaid MLTSS eligibility process.

New Jersey Does Not Need QITs to Rebalance Long Term Services and Supports

QITs have caused significant confusion amongst enrollees and their families and loss of coverage for nursing facilities and other settings, institutional and home and community based, since it has been implemented. The administrative burden of QITs are particular onerous on unrepresented, friendless or incapacitated applicants, and can lead to the unlicensed practice of law. Specifically, if an incapacitated person with income above the cap doesn't have a guardian to set up a QIT, retroactive eligibility will not be granted. COVID has only exacerbated these problems for post-emergency applicants.

The Rutgers Center for Health Policy *Stakeholder Feedback on Implementation of the Managed Care Expansion in LTSS* (Second Round, June 2017), stated the following about QITs on p. 13-14:

"QITs allow people who are over the official income limits for Medicaid financial eligibility to spend down excess income if it is going towards long term services and supports. QITs replaced the medically needy designation, which was only available to people living in nursing facilities. Stakeholders widely agree that the expansion of the spend-down ability to those living in other settings is a good policy and some had advocated for the trusts (Kitchenman, July 25, 2014). *However, advocates and CWA staff we spoke with think that the QITs are too*

Capital Impact Group, LLC • 134 West State St., Trenton, NJ 08608

• Phone: 609.989.5885 • Fax: (609) 989-1448

complicated and would like to see another method to allow this (see Pearl 2015). State staff told us in our first round of interviews that the medically needy option would not allow people in community settings to keep enough income to pay for their expenses, and QITs were the only other option for which there were other example states at the time that QITs were established (see Walker and Accius 2010; Watts and Young 2012).

In our first round of interviews, CWA staff reported that some people didn't seem to have anyone to do QITs for them. In our second round of interviews, the same staff had not found these concerns and the facility provider associations had not heard of facilities having problems due to people who could be Medicaid-eligible except for a QIT. *The CWA staff did still think that the QITs were too complicated for many people and that it was difficult and time consuming to explain to them what to do. CWA staff and an attorney reported that banks may not understand or be willing to open the accounts (see Pearl 2015).* CWA staff reported that mistakes by both the public and attorneys representing them in setting up or funding the accounts can lead to delays in eligibility.

State data presented to the legislature showed that from December 2014 until March 1, 2016, there have been 1054 QITs established (about 1/3 of QIT applications are estimated to be approved)—763 (72%) are for people in nursing homes, 218 (21%) are for people in Assisted Living, and 73 (7%) are for people living at home. Under the previous system, the 291 people outside nursing homes would not have been able to qualify for Medicaid to help pay for long term services and supports unless they entered a nursing facility. The CWA staff we spoke with did not know why so few QITs were approved; state staff noted that the applications with QITs may be withdrawn or denied for reasons unrelated to the QIT.”

QIT Final Agency Decisions in Medicaid

Although the Final Agency Decisions (FADs) do not fully represent the scope of the problems with QITs, they do show many of the issues. Illustrative is the P.C. decision; in which a Medicaid Applicant had spent down her assets at the assisted living facility from 2009 until 2014. P.C. v. Div. of Med. Assis. And Health Servs. and Middlesex Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 11293-2015, *rev'd*, Dir. (May 1, 2015). P.C. applied for Medicaid prior to the implementation of QITs but was denied because she was in an assisted living facility which was not covered under Medically Needy. She then moved to a nursing facility in January 2015 and reapplied but she was denied again for failure to establish the QIT. Had Medically Needy been permitted in all settings she would have been eligible after properly spending down. In this case, P.C. alleged the board of social services did not advise her of the need for the QIT. This is an extremely common allegation and the reality is that the burden of informing clients of the QIT is being placed on the board of social services, creating an administrative burden.

These FADs demonstrate that the QITs are used as a sword to deny eligibility rather a tool to expand home and community based services as it was originally intended.¹

We Should Spend Income Down Without QITs

There is no federal requirement that either all settings or no settings must use a QIT to maintain eligibility for those with income greater than \$2349 per month, and the State was mistaken in telling this to the Rutgers evaluators. Waivers can allow any pilot of post-eligibility income rules that promote the purpose of the Medicaid Act. In fact, the original approved 1115 waiver in NJ was a 217-like spend down without a QIT and this alternate system was never tested to see if it promoted rebalancing of long-term care better than QITs.

“217-like” was a reference to 42 CFR § 435.217 – “Individuals receiving home and community-based services”, which states: “The agency may provide Medicaid to any group or groups of individuals in the community who meet the following requirements:

- (a) The group would be eligible for Medicaid if institutionalized.
- (b) In the absence of home and community-based services under a waiver granted under part 441 -
 - (1) Subpart G of this subchapter, the group would otherwise require the level of care furnished in a hospital, NF, or an ICF/IID; or
 - (2) Subpart H of this subchapter, the group would otherwise require the level of care furnished in an NF and are age 65 or older.
- (c) The group receives the waived services”

“Any group” clearly includes medically needy individuals who would have spent down in a nursing facility. The original 2012 waiver designated a monthly figure based on our transfer-penalty divisor to subtract applicant’s income from as a substitute for a medically needy spend down calculation. This was a clean, straightforward way to determine who was income-eligible for Comprehensive Waiver services.

¹ See D.M. v. Div. of Med. Assis. And Health Servs. and Essex Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 2161-2016, *aff’d*, Dir. (Aug. 18, 2016) (denied eligibility due to inadvertently placing a resource in the QIT); D.B. v. Div. of Med. Assis. And Health Servs. and Union Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 412-2017, *aff’d*, Dir. (Aug. 9, 2017) (denied eligibility after not being told to establish QIT for several months after application); E.S. v. Div. of Med. Assis. And Health Servs. and Union Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 4367-2016, *aff’d*, Dir. (Jun. 29, 2016) (denied eligibility after QIT funded first month but not subsequent); J.A. v. Div. of Med. Assis. And Health Servs. and Morris Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 16980-2018, *aff’d*, Dir. (May 8, 2019) (penalty period assessed after funds remained in QIT); J.R. v. Div. of Med. Assis. And Health Servs. and Cumberland Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 18030-2019, *aff’d*, Dir. (May 12, 2020) (denied eligibility due to missing information in QIT document); J.S. v. Div. of Med. Assis. And Health Servs. and Cumberland Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 0046-2017, *rev’d*, Dir. (May 12, 2020) (denied eligibility as a result of inconsistent income); M.H. v. Div. of Med. Assis. And Health Servs. and Monmouth Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 3605-2019, *aff’d*, Dir. (Aug. 7, 2019) (denied eligibility as a result of income changing after application filed); M.S. v. Div. of Med. Assis. And Health Servs. and Gloucester Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 2581-2017, *aff’d*, Dir. (Jun. 21, 2017) (denied eligibility because QIT account opened but no trust executed); and R.P. v. Div. of Med. Assis. And Health Servs. and Gloucester Cnty. Bd. of Social Servs., OAL DKT NO.: HMA 5302-2017, *rev’d*, Dir. (Dec. 4, 2017) (denied eligibility after QIT trustee failed to do their job and was removed as power of attorney agent).

As reflected in Judge Boasberg's decision in *Stewart v. Azar*, an 1115 Waiver is designed to promote the objectives of Medicaid, chief of which is the provision of medical assistance to eligible populations. We must therefore ask: does the widespread and long-term establishment of a bank account/trust scheme with FAQs that number in the thirties best promote this objective if it also delays and denies eligibility to those who would have been income eligible for LTSS but for the QIT requirements?

Conclusion

1115 waivers are not a replacement for permanent Medicaid State Plan policy, they exist to pilot different ideas. If a policy comes up short, as Rutgers has documented that QITs do, then something else can be piloted to see if it produces a superior outcome for the people of this State. QITs do not have to be a permanent part of New Jersey's provision of LTSS. As part of the 2022 waiver renewal, New Jersey should ask for a Federal Technical Correction of its current 1115 waiver re-authorization to wind down QITs and instead implement the 217-like spend down as it was originally meant to be used when the New Jersey Comprehensive Waiver was designed in 2012.

Thank you for the opportunity to comment and we hope that our recommendations will be adopted.

Very Truly Yours,

A handwritten signature in black ink, reading "Laura L. Ergood". The signature is written in a cursive, flowing style with a large initial "L".

Laura L. Ergood
President, NJ NAELA